# IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

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| **ELY-BLOOMENSON COMMUNITY HOSPITAL** | **BMS CASE NO. 12-HA-0687** |
| **"EMPLOYER"** | **DECISION AND AWARD** |
| **And** | |
| **MINNESOTA NURSES ASSOCIATION** | **RICHARD R. ANDERSON ARBITRATOR** |
| **"UNION"** | **APRIL 23, 2012** |

## JURISDICTION

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson on March 6, 2012 in Ely, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into evidence by both parties and received into the record. The hearing closed on March 6, 2012. Post-hearing briefs were simultaneously mailed on April 13, 2012 and timely received on April 14, 2012, at which time the matter was taken under advisement.

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties' December 1, 2007, through November 30, 2010 collective bargaining agreement, hereinafter the Agreement, which was in effect at the time the grievance issue arose (Joint Exhibit 1).[1] The relevant language in Article 21 [GRIEVANCE PROCEDURE] provides for the arbitration to resolve all grievance issues. The parties waived the contractual arbitration panel set forth in Article 21 and stipulated that the instant grievance is properly before the undersigned Arbitrator for final and binding decision. The parties further stipulated that this

[1] Although the Agreement expired on November 30, 2010, the terms and conditions of employment continued in effect. A new Agreement effective December 1, 2010 had been agreed to but not reduced to writing at the time of the hearing.

matter does not involve contract arbitrability or any other substantive or procedural issues that would prevent this matter from being considered.[2]

## APPEARANCES

**For the Hospital**

Joseph J. Roby, Jr., Employer Legal Counsel
Rochelle Sjoberg, Human Resources Director
Becky Gaulke, Director of Nursing
Deborah L. Meir, Staff Support Manager
Amy Durham, IT/Financial Services Manager

**For the MNA**

Phillip Finkelstein, MNA Legal Counsel
Matthew LaBo, MNA Labor Relations Specialist
Susan Mick Pasmick, RN and MNA Chairperson
Kathy Champa, RN, Charge/OB Nurse and MNA Steward
Linnea Renner, Grievant and RN
Kimberly Renner Bielawski, RN and Charge/OB Nurse
Mary Ann Smith, RN and Home Care Charge Nurse

## THE ISSUE

The parties could not agree on the wording of the issue and left it up to the undersigned Arbitrator to frame it. Accordingly, the issue will be, *"Did the Employer violate the collective bargaining agreement when it retained less senior RNs and laid off the Grievant* Linnea Renner*; and if so, what is an appropriate remedy?"*

## BACKGROUND

Ely-Bloomenson Community Hospital, hereinafter the Hospital or Employer, is a non-profit corporation and the largest healthcare center that serves Ely, Minnesota and surrounding communities. The Hospital employs approximately 120 employees of which 28 are Registered Nurses (RNs). This 24-bed Hospital provides a full range of inpatient, outpatient and home care services. Prior to October 1, 2011, the Hospital also operated a skilled service nursing home. The Minnesota Nursing Association, hereinafter the Union or

[2] During the hearing, Counsel for the Hospital raised an issue as to whether the Hospital's staffing activity after the filing of the grievance herein could be considered since grievances were never filed covering those alleged staffing actions. This issue will be discussed in the Opinion.

MNA, is the collective bargaining representative of the RNs employed at the Hospital. The MNA has represented this unit since 1946.

The Hospital made a decision to sell its nursing home operation in the summer of 2011. The RNs were informed of this sale and of their pending layoff in a memorandum dated August 23, 2011.[3] As a result of the sale, the three RNs employed there including the Grievant Linnea Renner were to be laid off effective October 1.

On September 28, the parties held a Step 1 meeting to discuss the pending lay off of the Grievant. The matter was not resolved so the Union filed a grievance on September 30 (Joint Exhibit 3). The grievance alleges that the "*Hospital's actions constitute contract violations of Article 1 Recognition, Article 15 Low Need, Temporary Staffing Adjustment and Layoff when it denied Ms. Renner the right to bump a junior nurse, its expanded definition of "duties" and inability to demonstrate how allowing Ms. Renner to bump would have the "effect of depriving patients of needed nursing service." In addition, the Association retains its right to cite other contract provisions that prove relevant upon further investigation.*"

A Step 2 meeting was held on October 28 that resulted in Human Resource Director Rochelle Sjoberg denying the grievance in an email to the MNA dated November 1 (Joint Exhibit 4). The email stated; *"EBCH maintains its denial of the grievance, because Linnea would not have been able to perform the duties of the only two positions she could have bumped into, even with four weeks of orientation. In addition to the arguments and citations provided by EBCH at the Step II meeting, please also see contract section 3(K), which requires RNs to perform only those tasks for which they have been oriented, and section 6(L), which describes orientation in terms of "specific competencies" and "position requirements.*" On November 11, the MNA filed a Step 3 action to move the matter to arbitration (Joint Exhibit 5). Thereafter, Hospital Counsel Joseph Roby, Jr. notified the undersigned Arbitrator by letter dated January 4, 2012 that I had been selected as the neutral arbitrator in this matter.

[3] Hereinafter, all dates are in 2011 unless otherwise indicated.

# RELEVANT CONTRACT PROVISIONS

## ARTICLE 3 HOURS

**K.** *Registered Nurses will be expected to perform those tasks and functions for which she/he has been oriented prior to performing these tasks.*

## ARTICLE 6 SALARY

### L. ORIENTATION

*A planned systematic method of orientation will be utilized to familiarize a newly employed or transferred Registered Nurse. An orientation program will be provided and shall be based on experience, skills, and specific competencies and position requirements.*

## ARTICLE 15 LOW NEED, TEMPORARY STAFFING ADJUSTMENT AND LAYOFF

### B. LAYOFF:

*Before resorting to any layoff procedure, the Facility will offer the nurses an opportunity to voluntarily request a leave of absence without pay of not more than ninety (90) days. During such leave of absence, vacation and length of service rights shall continue to accrue. The Facility will not permanently fill the nurse's position during the period of leave of absence. Such leave of absence shall be granted at the discretion of the Facility.*

*In the event that it is necessary to lay off nurses due to lack of work, and such reduction of the work force is not achieved through application of Low Need, Temporary Staff Adjustment, nurses shall be laid off on the basis of the least length of seniority.*

### Seniority:

*For purposes of this Section 15, seniority shall be credited from the most recent date of employment in the bargaining unit. All credited and/or compensated hours count toward seniority.*

*A revised and up-to-date listing of seniority for each nurse in the bargaining unit will be posted by the Facility each six (6) months with a copy to the Minnesota Nurses Association. A revised up-to-date seniority list will be used for any hours reduction and provided to the Minnesota Nurses Association.*

*It is expressly agreed that the operation of this Section 15 shall not have the effect of depriving patients of needed nursing service. A nurse may be retained out of the sequence described above if nurses with greater seniority do not have the ability to perform the duties within a reasonable period of orientation not to exceed four (4) weeks.*

*A reduction of hours below the posting minimum, for nurses, shall be considered a layoff.*

*Before being laid off, a nurse shall be offered the opportunity to replace a junior nurse having less seniority to maintain his/her FTE.*

*If there has been a layoff, the Facility shall not newly employ nurses into the bargaining unit and shall not utilize non-bargaining unit personnel or casual nurses to replace any bargaining unit nurse until all nurses holding recall rights have been recalled.*

*A nurse who is laid off shall have the right at the time of layoff to receive appropriate prorated vacation with pay upon written request to the Facility.*

*Nurses on layoff who are qualified shall be given the opportunity to work intermittent shifts that are available, first to meet the minimum FTE of the nurses posting, by seniority, then to the hours to the upper end of the posting, before such shifts are offered to seasonal/intermittent or casual nurses. These shifts shall be offered to the most senior nurse in layoff status who is qualified to do the work offered. Such an offer shall not be considered a recall and may be refused by a nurse without such a refusal affecting her/his seniority status.*

*A nurse and the Association will be given two (2) weeks' written notice in advance of any layoff.*

**Recall:**

*Notice of recall shall be in writing to a nurse with simultaneous copy mailed to Minnesota Nurses Association. Recalls shall be in the order of seniority, with a nurse shall respond to a notice of recall within three (3) days of receipt; and if the nurse accepts recall she/he shall report to work within one (1) week of the notice. A nurse who has been recalled or offered a position different from the position from which the nurse was laid off may accept or reject such position without loss of recall rights under this Agreement. A different position means a difference in unit, or shift, or number of scheduled hours. A nurse recalled to the same position who declines the offer of recall shall lose all seniority rights.*

*A nurse unable to respond to notice of recall for reasons justifying a leave of absence shall be transferred to appropriate leave of absence status:*

*Seniority shall be lost if the nurse is not recalled from layoff status within one (1) year; but a nurse may have seniority rights extended for an additional period of one (1) year by giving written notice to the Hospital within thirty (30) days before expiration of the first year of layoff.*

## ARTICLE 21 GRIEVANCE PROCEDURE

*The Facility and Minnesota Nurses Association desire that each registered nurse have a means by which grievances may be given timely, fair and continued consideration until resolved. In order to facilitate confidence in this procedure, a nurse shall not be subject to criticism or reprisal for using the grievance procedure.*

*A grievance shall be defined as any controversy arising over the interpretation of or the adherence to the terms and provisions of this Agreement.*

*During the term of probation as referenced in Article 20, a nurse shall have access to the grievance procedure as it relates to the terms and provisions of this labor agreement, exclusive of termination*.

### A. Step I:

*The nurse and/or the Association local unit chairperson will informally discuss the grievance with the nurse's immediate supervisor. The immediate supervisor is defined as the first level supervisor above a head nurse.*

### B. Step II*:*

*If the grievance is not resolved at the time of the Step I informal discussion, it shall be reduced to writing and submitted to the Facility Administrator. The written grievance must be submitted to the Facility within fifteen (15) calendar days after the date of occurrence. A grievance relating to pay shall be timely if received by the Facility within fifteen (15) calendar days after the pay day for the period during which the grievance occurred.*

*Within fifteen (15) calendar days after submission of the written grievance to the Facility, a meeting to consider the grievance shall be held among representatives of the Facility, the Association which may be the Association local unit chairperson, and the nurse.*

*The Director of Nursing Service or such other person from the Nursing Service Department as the Facility may determine, shall participate in the meeting as one of the representatives of the Facility.*

*Within fifteen (15) calendar days following the Step II meeting, the Facility shall submit a written reply to the grievance to the Association and the nurse.*

### C. Step III:

*If the grievance is not resolved in Step II, either the Facility or the Association may refer the matter to arbitration. Any demand for arbitration shall be in writing and must be received by the other party within fifteen (15) calendar*

*days following receipt by the Association of the Facility's written reply to the grievance.*

*The arbitration request shall be referred to a Board of Arbitration composed of one (1) representative of Minnesota Nurses Association, one (1) representative of the Facility, and a third neutral member to be selected by the first two. In the event that the first two cannot agree upon a third neutral member within an additional five (5) days, such third neutral member shall be selected from a list of five (5) neutral arbitrators to be submitted by the Minnesota Bureau of Mediation Service; except that the parties may agree to waive the Board and appoint a single arbitrator. A majority decision of the Board of Arbitration will be final and binding upon the Minnesota Nurses Association, the Facility and the nurse. The decision shall be made within thirty (30) calendar days following the close of the hearing. The fees and expenses of the neutral arbitrator shall be divided equally between the Facility and the Association.*

## FACTS

The Grievant's history working as a RN after receiving her four year RN nursing degree is as follows (MNA Exhibit 2):

March 1987 - May 1988: St. Joseph Hospital, Marshfield, WI—Worked Full-time CVICU (Cardiovascular Intensive Care Unit)

June 1988 - May 1989: Phoenix, AZ.—Part-time (.7 FTE) local staffing in ICU (Intensive Care Unit), ER (Emergency Room), Burns, Post Partum,[4] CCU (Critical Care Unit), MICU (Medical Intensive Care Unit)

September 1989 - July 1990: Madison, WI and Columbia, MO—Full-time travel nursing, 4 months at the Burn Center at UW Madison, 3 months Trauma Center at UW Madison, 3 months Neuro Center ICU at UM, Columbia. Two contracts were 13 weeks each and one contract was 17 weeks.

September 1990 - May 1993: Minneapolis, MN—Part-time (.8 FTE) ICU float at Abbott-Northwestern Hospital. This was a weekend Bailer position in the Critical Care Float Pool,

May 1992 - April 1995: Ely, MN—Casual (.4 FTE) at Ely-Bloomenson Community Hospital. Hospital areas worked were ER including admissions and assessments, Step Down[5], Med/Surg (Medical-Surgical)[6], Post Partum, Critical

[4] The major focus of postpartum care is ensuring that the mother is healthy and capable of taking care of her newborn, equipped with all the information she needs.
[5] A hospital nursing unit providing intermediate care between an intensive care unit and a normally-staffed in-patient unit.
[6] The term used to describe the standard RN duties at a hospital.

Transports[7]. Worked on the days that she did not work for Vermillion Home Care or Abbott-Northwestern Hospital.

April 1993 - April 1999: Cook, MN—Part-time (.8 FTE) Home Care with Vermillion Home Care. Performed assessment, admissions, referral, discharges and supervision were some of the duties.

June 1999 - May 2001: Berkeley CA—Full time travel assignments with OnAssignment Staffing and an RN in ICU and Cardiac Catheterization Laboratory.[8]

June 2001 - September 2002: Location Unknown)—Full-time On-Site Manager with OnAssignment Staffing. No RN responsibilities.

October 2002 – March 2004: Virginia, MN—Full-time Manager with Spectrum Community Admissions. Performed assessments, referrals and discharges. RN duties included supervision (Charge Nurse) of LPN's (Licensed Practical Nurse) and CNA's (Certified Nursing Assistant).

March 2004 - May 2005: (Location Unknown)—Part-time (.5 FTE) consulting and managing for OnAssignment Staffing. No RN responsibilities.

May 2005 - October 2008: Ely, MN—Full-time Caregiver Consultant with North Woods Hospice Respite Partners connecting caregivers with support and ancillary services. Part-time (.5 FTE) RN responsibilities.

November 2005 - May 2009: Ely, MN—Casual (.4 FTE) at Ely-Bloomenson Community Hospital. Worked as a RN evenings and weekends when not working for North Woods. Performed the same duties as in 1992 - 1995.

November 2005 - October 2011: Ely, MN—Part-time (.7 FTE) Ely-Bloomenson Community Nursing Home, RN duties included admissions, assessments, evaluations, referrals, discharges and supervision (Charge Nurse) of LPN's and CNA'S.

Karen Wellander, Luann Fadum and the Grievant were the three nursing home RNs on the Hospital seniority list prior to October 1.[9] Pursuant to the Seniority provisions of the Agreement, nursing home RNs who were to be laid off were allowed to exercise

[7]An RN is assigned by a physician to accompany EMT's (Emergency Medical Technicians) during the transport of a critically ill patient to a more intensive care facility.

[8] A Cardiac Catheterization Laboratory is an examination room in a hospital or clinic with diagnostic imaging equipment used to support the cardiac catheterization procedure.

[9] There is one seniority list for the hospital, nursing home and home care operations.

"bumping rights" into the hospital.[10] Prior to the hearing, the parties executed a stipulated document outlining the bumping that subsequently occurred (Joint Exhibit 2). Fadum had the least Hospital seniority and, therefore, had no bumping rights (**Lay Off 1**).

Wellander had more seniority than the Grievant and was the first RN allowed to exercise bumping rights. Wellander was full-time in the nursing home and wanted to maintain full-time status in the hospital. She bumped full-time Med/Surg RN Jill Manning (**Bump 1**). Manning had not worked in Obstetrics (OB) or as a Charge Nurse (Charge), nor had she completed orientation and training in those skills. Although Wellander had never worked on the hospital side and did not have Med/Surg or any other specialty skill orientation and training, she was allowed to bump. According to Director of Nursing (DON) Becky Gaulke, she felt that Wellander would be able to complete the Med/Surg orientation and PCS computer training within the contractual mandated four (4) week time period required by Article 15.

The Grievant had been part-time at the nursing home and wanted to continue to maintain part-time status in the hospital. There were only three part-time RN's in the hospital—Trisha Hawkins, Susan Pasmick and Jill Houde. The Hospital refused to allow the Grievant to bump less senior RN's Pasmick or Houde because they had specialty skills that the Grievant did not possess. According to Sjoberg, Pasmick had specialized computer skills while Houde was qualified to work both as a Charge and in OB, and the Grievant would not be able to complete orientation and training in those skills within the contractually-mandated time period (Joint Exhibit 9).[11] As a result, the Grievant then bumped Hawkins (**Bump 2**). The Hospital subsequently refused to allow Hawkins to bump either less senior Pasmick or Houde because she did not possess their specialty skills and could not complete the training for those skills in the contractually-mandated time period. Unable to bump, Hawkins was laid off (**Lay Off 2**).

As a result of Bump 1, Manning lost her full-time position to Wellander. There were no full-time RN positions in the hospital to bump into, so Manning had to look to the seven part-time RNs still employed to exercise her bumping rights. The least senior RN of the part-timers was the Grievant. Thus, Manning bumped the Grievant (**Bump 3**). Since the

[10] Hereinafter, the lower case term hospital applies to the hospital section of the Hospital.
[11] Memorandum dated September 20 from Sjoberg to the Grievant.

Grievant could not bump Pasmick or Houde, she was laid off (**Lay Off 3)**.

Casual RN's were not included in this bumping scenario since Casual RNs with less seniority than the Grievant continued to be employed after October 1, and still remained employed at the time of the hearing. Manning, who was to be reduced to part-time effective October 1, was allowed to work full-time rather than part-time through October because she had not received the two-week lay off notice required by the Agreement (Hospital Exhibit 17). Hawkins also was allowed to work past her scheduled October 1 lay off because she too had not received her two-week lay off notice (Hospital Exhibit 18). According to Sjoberg, the Hospital did not initially notify them because it did not know who would be laid off until the 'bumping" process was finally completed.

The Grievant was certified in the following specialty skills at the time of her lay off and continued to be certified in them at the time of the hearing herein—RN, Advanced Cardiac Life Support (ACLS,[12] Basic Life Support (BLS),[13] Community Public Health Nurse (CPHN)[14] and Laser Medical Aesthetics[15]. She was also familiar with the Outcome and Assessment Information Set (OASIS) computer program used in Home Health Care.[16]

The Grievant worked primarily at the nursing home between November 2005 and May 2009. She was on the cross-training assignment list maintained by the Hospital. This meant that she was qualified to work at both the nursing home and the hospital. During this time period, she worked part-time (.4 FTE) at the hospital performing RN Med/Surg nursing duties.[17] Although she ceased working in the hospital side in 2009, she continued to be listed on the cross-training list until her lay off (MNA Exhibit 3).

The Code Spear Call List (CSCL) is a computerized list(s) organized according to nursing specialty skills maintained by the Hospital. Whenever extra help is needed in a

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[12]ACLS is a protocol for handling patients who are experiencing serious medical emergencies such as cardiac arrest. ACLS also refers to the skills and training necessary to use the protocol safely and properly.

[13] BLS is basic medical aid which is offered to people before they reach a hospital or in situations where high-level medical care is not immediately available.

[14] Community Public Health nursing is a specialized form of registered nursing that combines nursing and public health principles. According to the American Public Health Association, the primary focus of public health nursing is improving the health of the community as a whole rather than just that of an individual or family.

[15] Aesthetics involved in laser therapy and dermatology procedures.

[16] OASIS is a key component of the Centers for Medicare and Medicaid (CMS) partnership with the home care industry to foster and monitor improved home health care outcomes. It covers a variety of informational areas including inter alia patient care, patient assessment, nurse scheduling, and Medicare billing.

[17] During most of this period, she was also working part-time at North Woods Hospice.

particular skill at the hospital, all eligible RNs are notified through a robocall feature if an extra shift is available. If an RN desires this extra work, they are to call into to the shift scheduler. The responding RN with the greatest seniority in the needed skill level is then given this extra assignment. The Grievant continued to be listed on the hospital CSCL until her lay off even though she had not worked in the hospital since May 2009 (MNA Exhibit 4). During this time period, she received numerous robocalls for open positions at the hospital; but obviously did not respond. Although the Grievant was removed from this list on October 1, the retained Casual RNs remained on the list; and were still there as of the date of the hearing (MNA Exhibit 5).

The Hospital posted a part-time (.4-.6 FTE) RN position for the hospital on July 14 (Hospital Exhibit 23). The areas of responsibility listed on the notice included Med/Surg, OB, ER and Home Health. The Grievant did not respond to this posting and the position was awarded to less senior nursing home RN Hawkins.[18] Hawkins did not have Med/Surg or any other specialty skill orientation and training at the time of her selection.

The Grievant testified that she verbally contacted Gaulke twice during the summer of 2011 in order to get computer training and facility orientation in the newly remodeled hospital areas. This first verbal request was at the end of May or first part of June. According to the Grievant, she was scheduled to undergo knee surgery and was told by Gaulke to come see her after the surgery. She further testified that she approached Gaulke at the end of August and again verbally requested this orientation and training without apparent success. The Grievant also sought computer and facility orientation and training in writing on January 6, 2012, but again was rebuffed (Joint Exhibit 11). Sjoberg stated in her January 11, 2012 response letter that the Agreement did require the Hospital to afford orientation and training to laid off RNs (Joint Exhibit 12).

Twenty-eight (28) RNs were retained after the sale of the nursing home. This included 11 full-time RNs employed in the hospital and one (1) RN employed in Home Care. Six (6) RNs worked both as Charge and in OB. Three (3) RNs worked as Charge and have not completed OB orientation and training in order to work in OB.[19] Two (2) RNs neither work nor have completed orientation and training in either skill (MNA Exhibit 9).

[18] This evidence came to light after the Grievant testified, so it is not known why she declined to apply. The MNA stated in its brief that she refused to apply because the position was only .4FTE.

There were also 10 part-time RNs retained. Two (2) RNs worked primarily in Home Care. Three (3) of the remaining eight (8) RNs worked both as Charge and in OB. Two (2) RNs worked as Charge only; but appear to have also worked in OB at one time. One (1) RN worked in OB while the two (2) remaining RN's work neither as Charge nor in OB nor have they completed orientation and training in either skill (supra).

All six (6) Casual RNs with less seniority than the Grievant were retained after the sale of the nursing home. The MNA raised this issue during the October 28 Step 2 meeting (MNA Exhibit 10).[20] During this same meeting the MNA also questioned the Hospital's recent hire of RN Paula Shultz. It appears her employment was immediately severed since the seniority record dated February 3, 2012 discloses that Shultz had only accumulated nine (9) total work hours through that date (Joint Exhibit 7).[21]

No one in this Casual RN grouping worked either as Charge or in OB or completed orientation and training in those skills. Casual RNs worked 863.5 hours between the September 28 payroll and the February 17, 2012 payroll (Joint Exhibit 8). Casual RN Paula Hill compiled 469.5 of those hours.[22] According to MNA Exhibit 9, Hill worked most (exact number unknown) of the hours in Home Care, although this position was never posted. Less senior part-time RNs' Pasmick and Houde worked 356 and 371 hours respectively during this same time period.

The Grievant received notification in a memorandum that was dated September 20 (revised September 22) from Sjoberg that she had exhausted her bumping rights and would be laid off (Joint Exhibit 9). The memo stated that she had two options available to her. The first was to elect an involuntary lay off with 12 month recall rights with an additional 12 months upon a timely written request. Sjoberg also offered a second option in the memo. The memo stated;

> *According to the contract the 2nd option normally available would be to exercise seniority within the hospital and bump. Due to the orientation & training EBCH has invested in many nurses, and for other reasons, the contract requires a nurse bumping into another nurse's position should be able to perform the duties of that nurse's position within four weeks of orientation. The next (2) least senior nurses*

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[19] The two male RNs neither work nor have been oriented in OB.

[20] Testimony of MNA Labor Relations Specialist Matt LaBo and RN and MNA Steward Kathy Champa. Also in Champa's notes of the meeting.

[21] The MNA alleged during the hearing that a grievance filed by the MNA led to her termination; however, this and the circumstances of Shultz's employment were never litigated.

[22] This does not include the 9 hours worked by Shultz.

*would be Jill Houde who is OB and Charge RN orientated/trained and Sue Pasmick who also is qualified for PCS (Meditech Computer building). In reviewing the fact you just elected to bump and would just be starting orientation with Med-Surg and Computers, there are not any available positions where you would have the ability to perform the duties with four weeks of orientation. Therefore It has been determined the only available option is an involuntary lay-off as stated above in our first paragraph.*

*EBCH is working with the Administrator to see if we would be able to offer intermittent orientation shifts during your lay-off, however please keep in mind the MNA contract states Nurses offered intermittent shifts on lay-off status must be qualified to do the work offered. There is no guarantee however I will be meeting with the Administrator regarding this.*

Gaulke testified that the Grievant was not offered intermittent hospital or Critical Transport employment, work that Casual RNs performed after October 1, because the Grievant was not oriented in Med/Surg and had not worked in Critical Transport since May 2009. Gaulke further testified that the Grievant was not offered home care employment, work that Casual RNs and part-time RN Hill also performed after October 1, because she had not been oriented or ever worked in home care at the Hospital. Gaulke also testified that she did not review the Grievant's work history when she made the decision to lay off the Grievant.

The Hospital never contended that the Grievant's Hospital work history was a factor in her lay off. Evaluations offered by the MNA disclose that the Grievant's performance was acceptable and in some areas exceeded acceptable standards.

The Hospital was involved in a major renovation of its hospital facilities in 2009. As a part of this renovation, a new computer system (Meditech) or Patient Care System (PCS) was implemented. Pasmick and three (3) other RNs were chosen to undergo intensive or super PCS training in order to implement it into the Hospital's record keeping system. This initial super PCS training, which included a six (6) day session in Boston, Massachusetts in September 2009 and two (2) four (4) day and one (1) five (5) day sessions in Duluth, Minnesota began in September 2009 and was completed in February 2010. Financial Services Manager Amy Durham testified that the total initial super PCS training costs were approximately $40,000, with Pasmick's costs totaling $14,500 (Hospital Exhibit 5).

Once the RNs completed super PCS training, they began to program and implement PCS into the Hospital's computer system, and began to train their co-workers in the new

system. After the PCS was up and running and all the RN's were trained in how to input data into it, Pasmick assumed full-time PCS duties.[23] The other RNs had their super PCS duties eliminated except that one (1) RN continued to perform super PCS duties on a limited basis primarily to assist Pasmick or fill in for her whenever she was not available.

The hospital is a 24/7 operation. There are one (1) Charge and two (2) Med/Surg RN's on duty during the day and afternoon shifts. The night shift has one (1) Charge and one (1) Med/Surg RN on duty. All RN's have to go through PCS and Med/Surg orientation and training. The initial PCS training takes approximately one (1) to one and one-half (1½) days.

All new or transferred RNs have to go through Med/Surg orientation and training. This orientation and training encompasses policies, procedures, work environment, equipment and operations unique to the Hospital as well as basic skills on its PCS computer system. The length of training is varies with the work experience level of the individual RN.

The number of shifts of Med/Surg orientation and training for the last six (6) RN's who completed this training varied between 18 and 27 shifts (Hospital Exhibit 5). Gaulke testified that all of the aforementioned RNs were either newly hired or transferred without having any previous hospital Med/Surg/PCS training.

Ten (10) of the 27 RN's do not act as Charge or are not trained in that skill. Gaulke testified that Charge training is not offered until an RN has completed Med/Surg orientation and training and has worked on the floor for approximately 12 months. The number of shifts of Charge orientation and training then depend on the RN's progression. The training periods for last four (4) RNs who completed this training varied between 19 and 28 shifts (Hospital Exhibit 6). Houde completed her Charge orientation and training in 21 shifts during the time period of November 5, 2010 through March 4, 2011 at a cost of $4,594.83 (Hospital Exhibit 4).

Fifteen 15 of the 27 RNs do not work in OB or are not trained in that skill. The number of shifts of OB orientation and training required before an RN could work in OB was only proffered for Houde. Records disclosed that Houde received OB orientation and training in nine (9) partial or full shifts in a time period of September 29, 2010 through May 11,

[23] Although Pasmick's PCS duties are full-time, she occasionally works some part-time hours (exact number per month unknown) on the hospital floor and in surgery.

2011. This included three (3) trips to Duluth in 2011 at a cost of $1,937.41. Gaulke also testified that it could take several months for an RN to complete OB orientation and training because the hospital averages only 30 births a year. Many times, there is such a time gap between births that an RN has to travel to Duluth for training, as Houde did.

The MNA offered evidence at the hearing through the Grievant that Sjoberg had made a statement during the Step 1 meeting that was also attended by Charge/OB RN and MNA Steward and Gaulke that Houde was the future of the Hospital and younger than the Grievant. Sjoberg vehemently denied making this statement. The other attendees were not queried on this statement. It appears that this matter is now before the Equal Employment Opportunity Commission (EEOC) for investigation according to the MNA.

## UNION POSITION

The MNA's position is that the seniority, lay off and recall provisions in Section 15 are clear and unambiguous. The Hospital violated Article 15 and the Agreement when it laid off the Grievant on October 1 and it did not allow her to exercise her contractual bumping rights. In support of this position, the MNA argues that:

- Pursuant to Article 15, the Hospital should have allowed the Grievant to bump part-time hospital RN's Pasmick and Houde, Casual home care RN Hill and the other five (5) Casual RNs, all of whom had less Hospital seniority than the Grievant.
- The Grievant could complete the Med/Surg orientation and training for both the hospital and home care operations within the mandated-contractual time period. The Grievant has extensive previous experience working in other institutions including working as a part-time Med/Surg RN and in Critical Transport in the hospital. The Grievant also has previous work experience in home health care where she was familiar with the OASIS computer program system.
- Gaulke never inquired into the Grievant's previous work experience when she determined that the Grievant did not have the necessary orientation and training to be a Med/Surg or a Charge RN or to work in OB or in home care. The Grievant was also denied PCS user training and facilities orientation, both prior to her lay off and in January 2012.

- Other nursing home RNs, namely Wellander, Manning and Hawkins, were allowed to transfer without any previous hospital Med/Surg, Charge or OB or PCS experience or orientation and training.
- The Grievant was also on the cross-training and Code Spear call-in lists for the hospital, which was evidence that she was qualified to work in the hospital as a Med/Surg RN and in Critical Transport.
- The Hospital argues that the Grievant did not have any orientation and training as a Charge or in OB; therefore, she could not bump Houde. Adding that, the Grievant could not complete the orientation and training in those skills within the mandatory contractual time period. The MNA counters this by pointing out that the Grievant has an extensive work history and personal knowledge and could complete orientation and training in those skills within the contractually-mandated time period. In addition, not all the RNs working in the hospital are working as a Charge or in OB or have been oriented in those skills. In fact, none of the male RNs work in OB.
- The Hospital also argues that the Grievant did not have any super PCS training and could not be trained in the mandatory time period so she was not allowed to bump less senior super PCS RN Pasmick. The MNA argues that Pasmick only works an average of 20 hours a week and some of that time is as a Med/Surg RN in surgery. Further, other RNs are trained as super PCS operators; therefore, the Hospital's argument is a "red herring".
- The Grievant was not allowed to work intermittent shifts after her lay off that were given to Casual RNs in violation of Article 15. The MNA complained about this during the Step 2 meeting. The MNA, contrary to the Hospital's assertions, did not have to file a new grievance every time a Casual RN worked and/or was given an intermittent shift since each Hospital action in refusing to employ the Grievant while less senior RNs remained employed constituted a continuing violation of Article 15.
- The Grievant was not allowed to accept a voluntary lay off in violation of Section 15 prior to her being laid off.
- Finally, Sjoberg's age bias statement at the Step 1 September 28 meeting is a reason the Hospital circumvented the provisions of Article 15.

## HOSPITAL POSITION

The Employer's position is that it did not violate the Agreement and was justified when it laid off the Grievant. In support of this position, the Hospital argues that:

- The Agreement sets forth the fundamental principal at the heart of this matter in that no RN can fill a position unless they are "qualified" to fill that position. Virtually every kind of status change requires that the RN be oriented and trained for the work to be performed when filling an open shift (Section 3 J), no RN can be scheduled for three (3) shifts until other RNs are scheduled at least two (2) shifts unless the RN is qualified and needed to assure safe patient care, transfers (Section 5 C), return to work following medical, educational, and generic leaves of absence (Section 11 A, F, G) and the filling of a posted vacancy (Section 13). The Agreement also requires that an RN be oriented and trained in the position available before offering intermittent shifts to laid off RNs (Section 15 B) or recalling laid off RNs (Section 15 C).
- This fundamental principal also applies to lay off and recall. Section 15 allows a senior RN to bump a less senior RN, but only if they are qualified to perform the duties of the position being bumped "*within a reasonable time period of orientation not to exceed four (4) weeks*". The term "duties" means more than basic Med/Surg/PCS duties. The Hospital acknowledges that, "*All RNs have the ability to perform basic Med Surg/PCS duties within a reasonable period of orientation not to exceed four (4) weeks (give or take)*".[24] However, if this was all that was required, no RN could be laid off or recalled out of sequence, which would render the qualified provisions of Section 15 meaningless.
- The Hospital followed the provisions of Section 15 when it refused to allow the Grievant to bump less senior RNs Pasmick and Houde. Both were in positions where the Grievant was not oriented or trained nor could she learn those duties within the contractually-mandated time period. Had not the Hospital retained Pasmick or Houde, it would have been subject to meritorious grievances. This exception to lay off strictly by seniority also ensures that patients who are receiving specialized

[24] Hospital brief p.14.

treatments will continue to receive them. It also protects the Hospital's investment in the RNs who have received specialty orientation and training.

- The MNA contends that the Grievant had not received the contractual opportunity to be placed on a voluntary leave of absence. This would have been nonsensical since the nursing home was being sold and there would be no position to come back to. Moreover, any leave of absence is "*at the discretion of the Facility*", and would have been denied.
- The MNA also contends that the Hospital maintained the Grievant on its cross-training and Code Spear call-in lists making her ipso facto qualified to work on the hospital side. Carrying the Grievant on those lists was obviously a clerical error. Moreover, being maintained on those lists does not make the Grievant automatically qualified to fill any hospital position.
- The MNA also complains that the Grievant was not allowed facility and basic PCS orientation training both prior to and after her lay off. Even if those orientations and training had taken place, they would not have affected the lay off of the Grievant. Moreover, any alleged conduct engaged in by the Hospital after the Grievant was laid off that the MNA is attempting to arbitrate fails, since no grievance was ever filed regarding this allegation.
- Equally, the MNA never filed any grievance covering work that was performed by Casual RNs after the Grievant was laid off. The Agreement makes it clear that no issue can be arbitrated unless that issue is first grieved. Since no grievance was filed over the work performed by the Casual RNs including intermittent work, this issue is not properly before the Arbitrator.
- Even assuming arguendo that the post layoff orientation and training refusal and failure to recall issues are properly before the Arbitrator, they must be denied on their merits. There is nothing in the Agreement that requires the Hospital to incur the expense of putting an RN on the payroll solely for orientation and training. Further, the recall rights in Section 15 do not include any recall for the purposes of orientation and training. The recalled RN must be ready to go to work in the position recalled to without any orientation or training.

- The same rationale applies to post-lay off intermittent shifts worked by Casual RNs. It is the language in the Agreement that made the Grievant ineligible to work those shifts not the Hospital. Section 15 (Seniority) states, "*These shifts shall be offered to the most senior nurse in layoff status who is qualified to do the work offered*". The Grievant lacked any of the necessary orientation and training and simply was not qualified to fill the intermittent shifts that were available.
- The Hospital is hesitant to dignify the age bias statement allegedly made by Sjoberg, which she vehemently denied making. MNA Steward Kathy Champa testified at the hearing after the Grievant testified and was not asked to corroborate the Grievant's assertions nor did the MNA offer any other evidence to corroborate the Grievant's statement. Surely, such an incendiary remark made in Champa's presence would have been queried further.

## OPINION

The issue before the undersigned is whether the Employer violated the Agreement when it laid off the Grievant while retaining less senior RNs. The MNA bears the burden to prove this alleged contractual violation.

Although there is no management rights provision in the Agreement, it is axiomatic that the Hospital retains the inherent right to manage its operation including the right to determine the number and make-up of its staff at its facilities unless this right is specifically waived, modified or restricted by provisions in the Agreement or by long-standing past practice or would otherwise be violative of applicable labor statutes and/or laws. [25]

While there are no past practice history restrictions, the parties' Agreement does contain certain restrictions that inhibit the Hospital's inherent right to unilaterally determine RN staffing. Lay off according to seniority is one of these restrictions. Article 15 requires that, "*In the event that it is necessary to lay off nurses due to lack of work, and such reduction of the work force is not achieved through application of Low Need, Temporary Staff Adjustment, nurses shall be laid off on the basis of the least length of seniority*". However, Article 15 has a caveat to this restriction in that, "*A nurse may be retained out of*

[25] Elkouri & Elkouri, *How Arbitration Works,* 6th Ed., p.640 (2003)

*the sequence described above if nurses with greater seniority do not have the ability to perform the duties within a reasonable period of orientation not to exceed four (4) weeks*".[26]

The Hospital relied on the latter provision when it refused to allow the Grievant to bump Pasmick because it contended that Pasmick had super PCS specialty skills that the Grievant did not possess or could have possibly learned within the contractually-mandated time period. The evidence bears this out. Pasmick's initial PCS training covered 19 days in a time period that spanned from September 14, 2009 through February 12, 2010. Undoubtedly Pasmick learned additional PCS skills while working within the PCS system that the Grievant would also have to learn. It is inconceivable that the Grievant could learn the PCS skills acquired by Pasmick within the contractually-mandated period in order to fill Pasmick's position especially when she would have to be concurrently oriented in Med/Surg. Thus, the evidence clearly supports the Hospital's decision that the Grievant could not be trained to take over the super PCS duties within the mandated contractual time period.[27]

The MNA argues that other RNs were trained and had performed super PCS duties, therefore, the Super PCS duties could be absorbed by those RNs and Pasmick would not be insulated from the bumping process. This might be true if the super PCS duties were being performed or shared with the other initial super PCS RNs. Such is not the case. The evidence clearly demonstrated that once the initial programming functions and all the RNs were trained in the system, the Hospital created a single part-time super PCS position and Pasmick became the occupier of that position.[28] Granted, another RN also performed super PCS duties besides Pasmick after the programming and initial training of other RNs was completed. However, those duties were incidental to Pasmick's duties.[29]

The evidence adduced also indicated that Pasmick's Med/Surg duties were incidental to her super PCS duties. Finally, it is noted that all the other initial super PCS RNs were full-time RNs who worked both as Charge and in OB. If the Hospital was able to transfer

[26] It is not known if this time period applies to actual consecutive calendar weeks or the total number of shift times that comprise four weeks spread out intermittently over a longer time period.
[27] The Hospital had also invested a great deal of time and money in Pasmick's training.
[28] Pasmick was a part-time RN who averaged 20 hours per week. It appears that she only worked occasionally as a Med/Surg RN.
[29] Whenever Pasmick needed help or when Pasmick was not available.

the super PCS duties to one or all of them, it would most certainly diminish their available time for Charge and OB duties. With no one trained in the short run to cover those positions, they could be left short-handed.[30] In any event, since the Hospital made the managerial decision to create a part-time Med/Surg/Super PCS position occupied by Pasmick, it was justified in retaining Pasmick over the Grievant.

The Hospital also relied on the seniority caveat in Article 15 to retain Med/Surg/PCS RN Houde over the Grievant. Houde was oriented, trained and worked both as a Charge and in OB. The evidence disclosed that Houde completed her Charge orientation and training in 21 shifts during the time period from November 5, 2010 through March 4, 2011. Records also disclosed that Houde received OB orientation and training in nine (9) shifts in a time period from September 29, 2010 through May 11, 2011. This included three (3) trips to Duluth in 2011. When you add up Houde's Charge and OB training time, most of which was conducted concurrently but not on the same day, it totals 30 shifts covering a period from September 29, 2010 through May 11, 2011. Further, evidence adduced at the hearing disclosed that it could take as long as six (6) months for an RN to complete OB orientation and training because of the low birth rate at the hospital.

It could be argued that the Grievant could be trained as either a Med/Surg /Charge RN or as a Med/Surg/OB RN within the contractually-mandated period because of her previous RN employment history.[31] However, it is clear that the Grievant could not concurrently complete orientation and training in Med/Surg/PCS and in both specialty skills within the contractually-mandated time period The MNA also argued that not all RNs are trained as Charge or in OB. This fact is immaterial since all of the aforementioned RNs are more senior to the Grievant and there were no Med/Surg/PCS/Charge or Med/Surg/PCS/OB positions available for the Grievant to bump into. Since the Hospital made the managerial decision to staff a Med/Surg/Charge/OB position rather than a sole Med/Surg/PCS position, the Hospital was justified in retaining Houde over the Grievant.

The Grievant had extensive RN work experience at hospitals, nursing homes and home care facilities prior to her two employment periods at the Hospital (MNA Exhibit 8).

[30] Removing one of them from those specialties could possibly adversely affect the Hospital's staffing and patient care services.

The Grievant was initially employed at the Hospital from May 1992 through April 1995 as a casual RN working in the hospital side where she performed Med/Surg, ER including admissions and assessments, Critical Transport, Step Down and Post Partum duties. She returned to the Hospital in May 2005 and was initially employed as an RN and later a Charge RN in the nursing home until she was laid off. She was also employed by the Hospital and worked part-time in the hospital side as a Med/Surg RN from November 2005 through May 2009 where she performed the same duties as in her earlier tenure.

Although the Grievant had not worked in the hospital side since May 2009, she continued to be listed on the cross-trained list until she was laid off. She was also carried on the Code Spear list and remained there as of the date of the hearing herein. Even if the Hospital's position that carrying the Grievant on both of these lists after May 2009 was a "*bookkeeping* error", it does demonstrate that she was oriented and trained as a Med/Surg RN in the hospital less than 18 months before her lay off.

Evidence adduced through Gaulke disclosed that it would take an RN one (1) to one and one-half (1½) days to complete initial PCS computer training. According to records introduced by the Hospital, it took the last six (6) RNs 18 to 25 shifts to complete Med/Surg/PCS orientation and training (Hospital Exhibit 5). This Exhibit further disclosed that the training was spread out intermittently over a five (5) to eight (8) week time period.

Wellander, with no previous Hospital Med/Surg or PCS training or any facilities orientation and training, was allowed to bump a less senior Med/Surg RN because the Hospital believed that she could complete this training within the contractually-mandated period. The record (Hospital Exhibit 5) disclosed that Wellander completed her training in 25 shifts spread out over a seven (7) week time period. Obviously Wellander was not held to the contractually-mandated four (4) week time period. It is not known if the time period was extended due to no fault on the part of Wellander or if the Hospital magnanimously waived it.

If Wellander could complete the required orientation and training within the contractually-mandated time period without any prior Med/Surg/PCS hospital experience, it is inconceivable that the Grievant, who had extensive Med/Surg RN experience working at other institutions plus Med/Surg experience working in the hospital side within 18

[31] This assumes there would be enough births within that time period.

months of her lay off would not be able to do so. The same is true for both Manning and Hawkins who were allowed to transfer or bid into a Med/Surg/PCS position in the hospital without any previous Med/Surg/PCS experience.

It is also inconceivable that the Grievant could not be oriented into the home care side of the Hospital within the contractually-mandated time period since she had previous home care experience, albeit not at the Hospital.[32] This is corroborated by the testimony of Mary Ann Smith who is the most senior RN at the Hospital and the Charge RN in home care. According to Smith, based upon the Grievant's work history, she would have no problem becoming oriented within the contractually-mandated time period.

The Hospital argues that a number of provisions in the Agreement require that an RN be qualified before he/she assumes an open position. The provisions cited in its brief contained in the first paragraph under the heading Hospital Position in this Decision apply to situations other than bumping. Section 15 is clear that RNs bumping into a position held by a less senior RN have at least four (4) weeks to demonstrate their proficiency in that position.

I conclude that the Grievant could complete Med/Surg and/or Home Care orientation and training within the contractually-mandated time period. Further, the Hospital has not presented a shred of evidence that she could not. At the very least, she should have been allowed to demonstrate her ability to do so based upon her employment history, which Gaulke admittedly did not review prior to making her decision. Further, Section 6 (L) states,"*A planned systematic method of orientation will be utilized to familiarize a newly employed or transferred Registered Nurse. An orientation program will be provided and shall be based on experience, skills, and specific competencies and position requirements"*. Arguably, bumping constitutes a transfer.[33]

This conclusion, however, is irrelevant if no Med/Surg/PCS RN or Home Care RN position is available. The record is clear that no part-time Med/Surg/PCS position for which the Grievant was qualified was available when the Grievant was laid off; however,

[32] Although the OASIS computer program used in home care may have been updated since she last worked in home care, Smith testified that this should not pose a hindrance to her completing the home care orientation within the required time period.

[33] This is especially true herein where the outcome is the same and there is no specific language distinguishing the two terms.

six (6) Casual Med/Surg/PCS RNs who had less seniority than the Grievant were retained on October 1 and continued to be employed as of the date of the hearing. This group included an RN who worked primarily in Home Care. In addition, it appears that a Casual RN was hired after the Grievant was laid off and worked a short time period.

Casual Nurses are in the bargaining unit represented by the MNA. Therefore, absent specific contractual language or an established past practice waiver, the seniority provisions of Section 15 equally apply to them. Since there is no provision in the Agreement insulating Casual Nurses from lay off or any evidence of a past practice waiver, the Grievant should have been given the opportunity to bump less senior Casual RNs before being laid off.

There is additional language in Article 15 according to the MNA that supports the Grievant's claim to work performed by Casual Nurses after she was laid off. "*If there has been a layoff, the Facility shall not newly employ nurses into the bargaining unit and shall not utilize non-bargaining unit personnel or casual nurses to replace any bargaining unit nurse until all nurses holding recall rights have been recalled.*"

Further, "*Nurses on layoff who are qualified shall be given the opportunity to work intermittent shifts that are available, first to meet the minimum FTE of the nurses posting, by seniority, then to the hours to the upper end of the posting, before such shifts are offered to seasonal/intermittent or casual nurses. These shifts shall be offered to the most senior nurse in layoff status who is qualified to do the work offered. Such an offer shall not be considered a recall and may be refused by a nurse without such a refusal affecting her/his seniority status.*"

The aforementioned provisions further prove that the Grievant should have worked before the Hospital employed Casual RNs. It could be argued that the reference to "casual nurses" in these provisions do not apply to bargaining unit Casual Nurses. Assuming this were true, the fact remains that the Grievant should not have been laid off while any less senior Casual RN remained employed and should have been given hours before them.

The Hospital argues that no grievance was ever filed regarding work being performed by Casual RNs while the Grievant was laid off. This argument is spurious at best. Retaining less senior RNs while laying off the Grievant is the heart of the grievance. If the

Grievant had not been improperly laid off, she would have been entitled to those hours worked by Casual RNs. Therefore, any time a Casual RN worked while the Grievant was laid off constituted a continuing violation of her grieved lay off and did not have to be individually grieved each time a Casual RN worked. Moreover, the MNA's complained about this activity during the October 28 Step 2 meeting and reaffirmed its intent to include it in its grievance.

In view of the foregoing, I conclude and find that the Hospital did not violate Section 15 of the Agreement when it laid off the Grievant and retained less senior RN's Pasmick and Houde. I further conclude and find that the Hospital violated Section 15 of the Agreement when it laid off the Grievant while it retained less senior Casual RNs. In so finding, I reject the argument of the Hospital that the Grievant was not qualified to perform the duties performed by the Casual RNs on either the hospital or home care sides of the Hospital. According to all of the evidence presented, the Grievant could complete the orientation and training to support this bumping right within the contractually-mandated period.

In view of the above finding,[34] the Grievant is to be reinstated and offered Med/Surg/PCS training and orientation in the hospital and in home care. The Grievant is also entitled to back pay and seniority restoration. The back pay will be calculated from the date of her lay off until she is reinstated according to calendar quarters with no interest accumulation. The hours of reimbursement will be based upon the total hours worked by <u>all Casual RNs</u> less the time when two or more Casual RNs worked simultaneous hours. Total back pay will be reduced by the Grievant's interim earnings during each calendar period.

[34] In making this finding, I am not resolving the issue raised by Sjoberg's alleged age bias statement. The MNA complaint that the Grievant was not offered a voluntary lay off is also moot because of this finding.

## AWARD

IT IS HEREBY ORDERED that the grievance be and hereby is partially sustained.

IT IS FURTHER ORDERED that the Grievant be immediately reinstated with back pay and without any loss of seniority or other benefits subject to the conditions set forth in this Decision. Further, any reference to her lay off will be expunged from her personnel file.

The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

**Dated: April 23, 2012**

**Richard R. Anderson, Arbitrator**